No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL ASSOCIATION OF MACHINISTS, AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727 AND LOCAL LODGE 758, AFL-CIO, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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International Association of Machinists, Aeronautical Industrial District Lodge 727 and Local Lodge 758, AFL-CIO, hereinafter called the IAM, pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on July 18, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (*infra*, pp. 1a-10a). The decision and order of the National Labor Relations Board are reported at 123 NLRB 627 (R. 26-35).

JURISDICTION

The decree of the Court of Appeals was entered on July 18, 1960 (*infra*, p. 13a). A petition for rehearing had been denied on July 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a collective bargaining agreement which delegates to the contracting union the authority to determine the seniority status of an employee is invalid because "it is to be presumed" that the union will exercise its delegated authority in a discriminatory manner; and, if it is invalid, whether a contract which entrusts the determination of the particular seniority question to the "mutual agreement" of the employer and the union constitutes one in which the authority has been delegated to the union.

2. Whether a collective bargaining agreement is invalid, as discouraging union membership by discrimination in employment, if, for the purpose of determining whether an employee who moves from a unit is eligible to return to it on the basis of his seniority in his former unit, it provides that an employee who moves to a unit not represented by a union shall retain his seniority in his former unit while an employee who moves to a unit represented by a union shall lose his seniority in his former unit.

3. If the agreement summarized in question 2 is invalid, and employees by reason of its application are not returned to the former unit, may the Board require that the union consent to grant such employees seniority in the former unit and reimburse them for any pay lost because they were not returned to it.

STATUTE INVOLVED

Section 8(a)(3) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or conditions of employment to encourage or discourage membership in any labor organization. . . ." Section 8(b)(2) makes it an unfair labor practice for labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . ."

STATEMENT

I. The Facts

Menasco Manufacturing Company makes aircraft parts (R. 4, 9). In the conduct of its business it employs personnel to perform widely different functions in various departments (R. 43-44, 81). Most of the employees work within units represented in collective bargaining by labor organizations, while others are unrepresented (*ibid.*). Thus the "hourly paid" or production employees are represented by petitioners, herein called the IAM (R. 97). Another unit of employees consists of those working in the classifications of Tool Engineer, Process Engineer and Time Study Engineer, who are represented by American Federation of Technical Engineers, Local 183 (AFTE) (R. 106). Guards

and truck drivers are in still other separate units represented by different labor organizations (R. 43, 81). And the employees who are not represented by any union work in the sales department, finance department, laboratory and material control department, and as design engineers (R. 43-44).

The agreement between the Company and the IAM contained certain provisions governing the movement of employees from the production unit to jobs outside it and the return to the production unit of the employees who had moved from it. As to movement from the production unit, Section 4.41 of the agreement provided that (R. 96):

> The Company will continue its practice of notifying all employees of anticipated job openings for salaried positions through the rank of Foreman by posting notices of such anticipated openings. Employees are invited to submit bids for these jobs. The standards used in the selection of any bidder for any job outside the bargaining unit is in the sole discretion of the Company.

Section 4.32(c) of the agreement specified the conditions to be met for the return to the production unit of employees who had moved from it (R. 94):

> An individual in the employ of the Company who had established seniority in excess of one (1) year at time of movement to a position outside the bargaining unit shall at time of layoff or release (but not discharge) be given the opportunity to bump into the bargaining unit (last previously held classification in reverse order) provided he possesses greater seniority than the employee bumped and meets the seniority requirements as set forth in Paragraph 4.16, complies with the terms set forth in Paragraph 4.21 and is then competent to do the work.

The "seniority requirements" of Section 4.16, noted in Section 4.32(c), divided employees into three classes. The first class covered employees with less than one year seniority at the time of movement from the unit (R. 90):

> An employee who has acquired less than one (1) year seniority in the bargaining unit and who moves from an occupation represented by the Union to an occupation in the Company not represented by the Union, and who later is moved back to an occupation represented by the Union, shall have seniority from the date of his move into the bargaining unit.

The second class pertained to employees with one year seniority who moved to occupations not represented in collective bargaining by any union (R. 91):

> An employee who has acquired at least one (1) year seniority in the bargaining unit and who moves to an occupation in the Company not represented by another collective bargaining agent, and who later moves back into an occupation represented by the Union, shall have seniority from the latest date of hire with the Company.

The third class pertained to employees who moved to occupations represented in collective bargaining by a union (R. 91):

> An employee who moves into an occupation represented by another collective bargaining agent, and who later moves back into an occupation represented by the Union, shall have seniority from the date of the move back into the bargaining unit.

Section 4.16 concluded with the provision that: "The Company and the Union may by mutual agreement restore seniority to any employee who moves back into

the bargaining unit under any of the three categories mentioned above" (R. 91).

Three employees moved from the production unit represented by the IAM to work in the engineers unit represented by AFTE. *James S. Gibbs* left the production unit on August 15, 1955 to work as a process engineer (R. 46, 51); before he left he was a bench tool maker in the production unit (R. 50); his employment in the production unit had begun in 1948 (R. 46). *James A. Madison* left the production unit on August 27, 1956 to work as a process engineer (R. 66); before he left he was a tool inspector in the production unit (R. 65); his employment in the production unit had begun on September 13, 1948 (R. 56-57). *Trinnis F. Light* left the production unit on August 27, 1956 to work as a tool engineer; his employment in the production unit had begun on March 28, 1952 (R. 65-66).

All three were laid off from their positions in the engineers unit on March 14, 1958 (R. 47-48, 60, 66), having been given notice by the Company on March 11, 1958 that "Due to a reduction in force, it will be necessary to place you on a lay-off status" (R. 54, 60, 82). Under the agreement between the Company and AFTE, layoff in the engineers unit was based on "seniority in the classification in which layoff is being made" (R. 108, 75, 76-77, 79-80, 87), and Gibbs, Madison, and Light were the junior employees based on their service in the job classifications occupied by them in the engineers unit (R. 73-74, 75-76). Had their seniority in the production unit been added to their seniority in the engineers unit, they would have been senior to employees in their classification in the engineers unit who were retained in service (R. 73-74, 76, 86). Under the agreement between the Company and AFTE, "An

employee who is laid off will retain for a period not in excess of twelve (12) months, but will not accumulate, seniority" (R. 107), and during that period is eligible for recall in order of seniority as work in his classification becomes available (R. 108).

At the time of his layoff as a process engineer, Gibbs had greater plant-wide seniority than bench tool makers then employed in the production unit (R. 50), the job of bench tool maker being that which Gibbs had occupied when he had moved from the production unit more than two and one-half years before (*supra*, p. 6). Similarly, at the time of his layoff as a process engineer, Madison had greater plant-wide seniority than tool inspectors then employed in the production unit (R. 65, 80), the job of tool inspector being that which Madison had occupied when he had moved from the production unit two years before (*supra*, p. 6). There is, however, no evidence that Light, at the time of his layoff, was senior to any employee then working in the classification in the production unit from which Light had moved two years before.[1]

Between the notice of layoff given on March 11, 1958, and the effectuation of the layoff on March 14, 1958, two meetings were held, at the instance of AFTE representatives (R. 55), at which there was a discussion of the eligibility of the laid-off employees to "bump back" to the production unit (R. 48-49, 54-55, 60-61). The first meeting was attended by representatives of the

[1] The court below agreed that the record contained no such evidence but it affirmed the Board's finding upon the basis of an asserted concession upon oral argument before it (*infra*, p. 3a). The petition for rehearing pointed out that no concession had been made (p. 6), and the Board in its opposition did not contest this representation (pp. 2-4). The petition for rehearing was denied.

AFTE, representatives of the Company, and Gibbs and Madison (R. 61). In response to the question as to the "status" of the laid-off employees "as far as bumping is concerned," the Company representative stated that, under the terms of the Company's agreement with the IAM, the laid-off employees could not "bump back" into the production unit "unless . . . [the Company] was requested by the IAM" to authorize their exercise of "bumping privileges" (R. 48-49); "it would have to be by mutual agreement between . . . the IAM and the company . . . to go back, and . . . [the Company] would have to have a request from the IAM in order to establish that bumping privilege" (R. 61).

In addition to the individuals present at the first meeting, the second meeting was attended by an IAM representative (R. 71, 48, 49). The Company took the same position as it had at the first meeting (R. 55). According to the AFTE representative, the Company representative stated "that the company would be very happy to restore the seniority" of the laid-off employees, but "could not do it, without a request from the IAM to do so" (R. 88). The IAM representative at the meeting "stated that he had to have a request from the company" (R. 64). The Company, however, did not at this meeting, or at any other time so far as appears, ask the IAM to grant "bumping privileges" to the laid-off employees (R. 72, 89). In referring to a contractual requirement of a request from the IAM, the Company representative stated that he was adverting to the provision of the agreement with the IAM that "The Company and the Union may by mutual agreement restore seniority to any employee who moves back into the bargaining unit under any of the three categories mentioned above" (R. 62-63, 91, *supra*, pp. 5-6).

II. The Board's Conclusions

The Board found that the agreement was invalid on its face in two separate and distinct ways: (1) through the "seniority provisions whereby employees with at least one year seniority who transferred out of the bargaining unit represented by the . . . [IAM] to a unit not represented by any union were permitted to retain their seniority, whereas employees with the same seniority who transferred into a unit represented by another union lost their seniority," and (2) through the provision "whereby the . . . [IAM was] given a veto power to determine whether the seniority thus lost by the latter employees should be restored" (R. 27-28). The Board further found that the three laid-off employees "were discriminated against as a direct result of the application and enforcement of the seniority provisions of the contract" (R. 28). According to the Board, these three were "deprived of their seniority and of their former jobs to which they would have otherwise been entitled had they not been previously represented by the Engineers. Therefore, the net effect of the application and enforcement of the seniority provisions of the contract was to penalize the employees for exercising their statutory right to be represented by a union of their own choosing and to discourage membership in such union within the meaning of Section 8(a)(3) of the Act" (R. 30).

III. The Board's Order and Its Enforcement

The order entered by the Board requires the IAM *inter alia* to cease and desist from (R. 31):

> Performing, maintaining or otherwise giving effect to the provisions of any agreement with Menasco Manufacturing Company . . . , which [1] unlawfully discriminates with respect to the ac-

> quisition, retention or restoration of seniority rights of employees of the said Company . . . , *or* [2] which delegates to the Respondents [IAM] the right to determine the seniority status of any employee. . . . [Emphasis supplied.]

Affirmatively, the order *inter alia* requires that the IAM (R. 31-32):

> Notify Menasco Manufacturing Company, James S. Gibbs, Triness F. Light and James A. Madison, in writing, that it consents to the restoration of the said employees' seniority determined on the basis of the employees' latest date of hire with the Company prior to their layoff, and that it has no objection to the exercise by the said employees of their seniority rights, including the right to "bump" employees of lesser seniority in the unit of employees represented by the Respondents [IAM].
>
> Make whole James S. Gibbs, Triness F. Light and James A. Madison for any loss of pay suffered by reason of Respondents' [IAM's] action in causing the Company to discriminate against said employees. . . .

The court below enforced the Board's order with a modification not material to this petition (*infra*, pp. 11a-13a).[2]

REASONS FOR GRANTING THE WRIT

The heart and importance of this case reside in the Board's "intrusion into the substantive aspects of the bargaining process. . . ." *National Labor Relations Board* v. *Insurance Agents' International Union*, 361

[2] The court below struck from the order its extension to "any other employer" and its enlargement to embrace restraint and coercion in any other manner (*infra*, pp. 9a-10a).

U.S. 477, 490. The Board has arrogated the power to "sit in judgment upon the substantive terms of collective bargaining agreements" (*National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 404), in conflict with the statutory command that what an agreement should contain "is an issue for determination across the bargaining table, not by the Board" (*id.* at 409). The parties "are to work out their agreement themselves." *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295.

The Board in this case interfered in the formation of the substantive terms of a collective bargaining agreement in two separate and distinct ways: (1) it held that an employer and a union may not by contract delegate to a union the authority to determine the seniority status of an employee; and (2) it held that an employer and a union may not, for the purpose of determining whether an employee who moves from a unit is eligible to return to it on the basis of his seniority in his former unit, provide by contract that an employee who moves to a unit not represented by a union shall retain his seniority in his former unit while an employee who moves to a unit represented by a union shall lose his seniority in his former unit. Examination of each determination discloses the deep inroad made by the Board into "controlling the settling of the terms of collective bargaining agreements." *National Labor Relations Board* v. *Insurance Agents' International Union*, 361 U.S. 477, 487.

1. The contract between the Company and the IAM provided that they "may by *mutual agreement* restore seniority to any employee who moves back into the bargaining unit . . ." (*supra*, pp. 5-6, emphasis supplied). The Board holds (R. 28, n. 3) that this provision falls

within the ban of its ruling that an agreement "that delegates complete control over seniority to a union is violative of the Act because it tends to encourage membership in the union." *Pacific Intermountain Express Co.*, 107 NLRB 837, 845, enforced as modified, 225 F. 2d 343 (C.A. 8). The Board reasons that the provision for "mutual agreement" constitutes delegation of complete control because it gives the "IAM a veto power to determine whether the seniority . . . should be restored" (R. 28). It therefore ordered the IAM to cease and desist from "Performing, maintaining or otherwise giving effect to the provisions of any agreement . . . which delegates to . . . [it] the right to determine the seniority status of any employee" (R. 31).

The extraordinary character of this demarche is emphasized by relating the operation of the provision for "mutual agreement" to the section of the contract of which it is a part. Section 4.16 of the agreement provides in part that (R. 90-91):

> An employee who has acquired less than one (1) year seniority in the bargaining unit and who moves from an occupation represented by the Union to an occupation in the Company not represented by the Union, and who later is moved back to an occupation represented by the Union, shall have seniority from the date of his move back into the bargaining unit.

There can be no doubt as to the legality of requiring a minimum period of service within the unit as the condition for the retention of seniority within that unit upon movement from it. Applicable to this category of employees (those with less than one-year seniority) is the provision that "The Company and the Union may by mutual agreement restore seniority to any employee

who moves back into the bargaining unit. . . ." Yet the Board holds that, since the Company may wish to restore seniority but the IAM may not, the agreement is invalid because it gives the IAM "a veto power to determine whether the seniority thus lost . . . should be restored" (R. 28). And so the Board concludes that it is illegal to require "mutual agreement" to restore seniority to such an employee.

The doctrine of the Board exemplified by this case originated in 1954 with its decision in *Pacific Intermountain Express Co.*, 107 NLRB 837, enforced as modified, 225 F. 2d 343 (C.A. 8). Reversing its previous view (*id.* at 844-845; *Firestone Tire and Rubber Co.*, 93 NLRB 981, 984), the Board enunciated the novel notion that an agreement "that delegates complete control over seniority to a union is violative of the Act because it tends to encourage membership in the union." 107 NLRB at 845. This notion is predicated explicitly and exclusively on the premise that "it is to be presumed" that the union will exercise its delegated authority in a discriminatory manner. As the Board stated (*ibid*):

> We can . . . see no basis for presuming that when an employer delegates to a union the authority to determine the seniority of its employees, or even to settle controversies with respect to seniority, such control will be exercised by the union in a nondiscriminatory manner. Rather, it is to be presumed, we believe, that such delegation is intended to, and in fact will, be used by the union to encourage membership in the union.

This presumption is to be entertained despite the presence in the agreement of a plain statement that the union shall act "without regard to whether the em-

ployees involved are members or not members of the Union." 107 NLRB at 844, 845-846.

The Board's rule is thus based on a bare and conclusive presumption that the union will act discriminatorily. "But a discriminatory purpose is not presumed. . . ." *Snowden* v. *Hughes*, 321 U.S. 1, 8. "The presumption is the other way. To be established it must be proved." *Mitchell* v. *United States*, 21 Wall. 350, 353. The "law will never presume that parties intend to violate its precepts. . . ." *Owings* v. *Hull*, 9 Pet. 607, 628. The contrary presumption in which the Board's rule is rooted is offensive to civilized jurisprudence.

The Board's rule is also offensive to the philosophy of collective bargaining which the Act embraces. Whether the agreement should commit a particular subject to the exclusive determination of either management or labor, or whether the determination should be shared responsibility, is a decision that the employer and the union are to make for themselves at the bargaining table. They are "to establish, through collective negotiation, their own charter for the ordering of industrial relations. . . ." *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 295. An employer is free to bargain for and to secure the commitment of certain employment conditions to his exclusive control. *National Labor Relations Board* v. *American National Ins. Co.*, 343 U.S. 395; *White* v. *National Labor Relations Board*, 255 F. 2d 564 (C.A. 5). A union has no lesser freedom. Since it would be entirely valid were the agreement to commit seniority determination exclusively to the employer, it is no less valid if the agreement commits it exclusively to the

union. The Board's contrary conclusion is inconsonant with the scheme of the Act and in conflict with this Court's decision in *National Labor Relations Board* v. *American National Ins. Co., supra.*

The vice of the Board's major premise is matched by its application in this case. Even assuming that an agreement "that delegates complete control over seniority to a union is violative of the Act" (*supra*, p. 13), the agreement in this case subjects the restoration of seniority to the "mutual agreement" of the Company and the Union. "Mutual agreement" is the antithesis of "complete control." Neither controls where the assent of both is required. However, says the Board, seniority was not restored to the laid-off employees, for while the Company was willing to reestablish their seniority, the IAM was not. And so the vice of the agreement, according to the Board, is that it gave the IAM "a veto power to determine whether the seniority . . . should be restored" (R. 28). But the alternative to a so-called veto power in the IAM is to vest unilateral control in the Company. Surely the vice of "complete control" in the union, if such it be, is not cured by the vice of "complete control" in the employer. The agreement in this case steers between the Scylla and Charybdis of "complete control" in either party by requiring the "mutual agreement of both. It is hard to believe that "mutual agreement" is offensive to any value that the Act promotes.

The question presented by the Board's rule is important and recurring. Yet the rule threatens to become part of the law of collective bargaining without serious examination of its import. Three courts of appeals, including the court below, have approved the

rule,[3] but no opinion has squarely faced and carefully considered the premises upon which the rule rests. The Board itself is insouciant to the defects in the premises of its rule, and adjudication by it is confined to parsing the agreements, condemning those it regards as investing seniority control in the union[4] and approving those it deems do not.[5] But neither the Board nor any court has troubled to explain how condemnation can lawfully be predicated upon a rule founded upon an irrebuttable presumption that a union cannot be trusted to determine seniority questions in a nondiscriminatory manner.

The position of the Board upon commitment of seniority determination to a union is akin to, but more extreme than, its position in the hiring hall cases, the validity of which is before this Court in *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, No. 64, October Term 1960. The kinship is shown by the statement of the court below upon which it based its affirmance of the Board's position (*infra*, p. 7a):

> Just as it would be violation of the Act for an employer to require union approval as a prerequi-

[3] *National Labor Relations Board* v. *International Brotherhood of Teamsters*, 225 F. 2d 343 (C.A. 8); *National Labor Relations Board* v. *Dallas General Drivers*, 228 F. 2d 702 (C.A. 5). A fourth court of appeals assumed but did not approve the validity of the Board's rule, and set aside the Board's order because it was unsound even granting the premise on which it was based. *Local 553, Teamsters Union* v. *National Labor Relations Board*, 266 F. 2d 552 (C.A. 2).

[4] *E.g.*, *Marcus Trucking Co., Inc.*, 126 NLRB No. 31, 45 LRRM 1435, 1437; *Miranda Fuel Co., Inc.*, 125 NLRB No. 53, 45 LRRM 1122; *Kramer Bros. Freight Lines, Inc.*, 121 NLRB 1461.

[5] *E.g.*, *Florida Power & Light Co.*, 126 NLRB No. 122, 45 LRRM 1424; *Carolina Freight Carriers Corp.*, 125 NLRB No. 54, 45 LRRM 1117; *Armour and Co.*, 123 NLRB 1157.

> site to employment . . . , so also would the complete delegation to a union by an employer of the task of determining seniority rights be a violation of the Act, unless the criteria established by agreement for union determination of seniority are nondiscriminatory, and the union's duties with respect to such determination are merely ministerial.

This statement expresses in essence the Board's view in the hiring hall cases.[6] Under this view an employer and a union may not by contract validly provide that an employer shall hire workers solely upon referral from a hiring hall operated by a union unless the contract explicitly incorporates three requirements: (1) selection of applicants for referral to jobs shall be on a nondiscriminatory basis; (2) the employer retains the right to reject any job applicant referred by the union, and (3) the parties to the agreement post notices of all the provisions relating to the functioning of the hiring arrangement. It is this view which is the premise for the court's statement that "it would be a violation of the Act for an employer to require union approval as a prerequisite to employment," as well as for the statement that nondiscriminatory criteria for union determination of seniority must be "established by agree-

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[6] Compare the Board's statement of the question presented in its petition for a writ of certiorari to review the judgment adverse to its position in the hiring hall cases in *National Labor Relations Board* v. *Hod Carriers*, No. 75, October Term 1960: "Whether a labor organization violates the provisions of the National Labor Relations Act forbidding discrimination on the basis of union membership, by carrying out an agreement with an employer which requires that all applicants for employment must be approved by the union but does not provide adequate assurances that such approval shall be exercised on a nondiscriminatory basis."

ment."[7] This is confirmed by the court's citation of the Board's decision in *Los Angeles-Seattle Motor Express, Inc.*, 121 NLRB 1629, 1630-1631, in which this Court granted certiorari *sub nom., Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, No. 64, October Term 1960, and its citation of the First Circuit's decision in *National Labor Relations Board* v. *Carpenters Local 176*, 276 F. 2d 583, both of which express the Board's position in the hiring hall cases (*infra*, p. 7a).

Should this Court reject the Board's hiring hall position, it would necessarily undermine the Board's seniority control position. If a union may operate a hiring hall which shall be the exclusive source of employment without incorporating into the agreement affirmative assurance of nondiscriminatory operation, it follows that the determination of seniority may equally be committed to the union. The presumption that the union will determine seniority discriminatorily is no more tenable than the presumption that it will operate the hiring hall discriminatorily. And the Board's rule that seniority determination may not be entrusted to a union, even if assurance of nondiscriminatory application is written into the agreement (*supra*, pp. 13-14), is plainly more extreme than the Board's rule that a union may operate a hiring hall if the Board's requirements for nondiscriminatory operation are included in the agreement. Furthermore, since a union's operation of an exclusive hiring hall is

[7] The court below states that union determination is unlawful "unless the criteria established by agreement for union determination of seniority are non-discriminatory. . . ." This means that, however nondiscriminatory the union's basis actually is for the determination of seniority, it is still unlawful unless that basis is incorporated in the agreement.

anything but ministerial, rejection of the Board's hiring hall position would undermine the statement of the court below that a union's determination of seniority is unlawful unless "the union's duties with respect to such determination are merely ministerial" (*infra*, p. 7a).

Central to the Board's hiring hall position, the validity of which is already before this Court, and to its seniority control position, the validity of which is presented by this case, is that in its zeal to eliminate union discrimination from the employment relationship the Board has eliminated the union from, or circumscribed the terms on which it may participate in, the determination of incidents of the employment relationship. According to the Board, a union may not exclusively determine seniority at all, and it may not operate a hiring hall except on the Board's terms. Both positions rest on the proposition that a union cannot be trusted to exercise these functions in a nondiscriminatory way, and both positions deeply implicate the Board in the formation of the substantive terms of the bargain. Joint consideration of both positions would illuminate and enhance sound determination of each.[*]

2. The second and distinct way in which the Board interfered in the formation of the substantive provisions of the agreement is its invalidation of the contractual specification of the terms upon which an employee who moves from a unit is eligible to return to it. Invalidation is bottomed on the fundamentally false premise that differentiation in employment terms based

[*] Other instances of the Board's interference in the formation of the substantive terms of the agreement are shown in the petition for a writ of certiorari in *International Typographical Union* v. *National Labor Relations Board*, No. 339, October Term, 1960.

on *unit* membership constitutes discrimination in employment based on *union* membership. And affirmance of the invalidation by the court below is predicated upon its serious misreading of this Court's decision in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17 (*infra*, pp. 24-27).

The agreement between the Company and IAM provided that an employee who moves from the production unit to a position in a unit not represented by a labor organization shall be entitled upon his layoff from the unrepresented unit to "bump into" the production unit if "he possesses greater seniority than the employee bumped," while an employee who moves to a unit represented by a labor organization shall not have this opportunity (*supra*, p. 5). Although this proceeding is directed against the IAM alone, the substantive considerations relevant to determining the validity of the provision apply equally to the Company and the IAM. For the agreement is the Company's as well as the IAM's; it is the product of their joint effort. The question presented, therefore, is whether it is an unfair labor practice for an employer and a union to agree to withhold out-of-unit seniority from one group of employees, while conferring it upon another group of employees, based upon whether the movement from the production unit is to a represented unit or to an unrepresented unit. In short, is differentiation based on *unit* membership, not *union* membership, an unfair labor practice?

Ordinarily seniority has an exclusively contractual basis.[9] The right of an employee who moves from a

[9] *E.g.*, *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 53, n. 21; *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 526.

unit to return to it is a preeminent instance of a seniority question which the contract controls. It is universally recognized that whether an employee, who has been promoted or transferred from a unit, is entitled to return to the unit upon his layoff from the excluded position, is a matter which depends upon what, if any, seniority status within the former unit the contract grants him.[10]

The Board nevertheless asserts that the Act curtails the contractual freedom of an employer and a union to determine out-of-unit seniority by prohibiting the use of movement to a represented or unrepresented unit as the criterion for differentiating between the grant and withholding of seniority. The crux of the Board's theory is that employees who move from the production unit to unrepresented units will be dissuaded from joining a union or selecting union representation in their new unit in order not to relinquish their seniority in the production unit. According to the Board, "the net effect of the application and enforcement of the seniority provisions of the contract was to penalize the employees for exercising their statutory right to be represented by a union of their own choosing and to discourage membership in such union within the meaning of Section 8(a)(3) of the Act" (R. 30).

The vital principle ignored by the Board is "that the statutory scheme did not contemplate that disparate treatment among employees in different separate units *along unit lines* would, by itself, give rise to a finding of

[10] *E.g.*, Collective Bargaining Provisions, Seniority, Bull. 908-11, U.S. Dept. of Lab., Bur. Lab. Stat., 41-47 (1949); Union Contract Clauses, Commerce Clearing House, ¶ 51,732 (1954); Basic Patterns in Union Contracts, 75:10-10 (a) (Bur. Natl. Aff., 4th ed., Oct. 1957).

discrimination. To hold otherwise would create a wholly unrealistic requirement that would impose intolerable conditions on an employer who had concurrent bargaining relationships with separate bargaining agents representing separate units of employees in the same or other plants of the employer. As we view it, an untold variety of factors and circumstances may exist which from the very nature of the different units and from the differences in bargaining relationships would render any attempt at inferring discriminatory motivation both speculative and futile." *Anheuser-Busch, Inc.*, 112 NLRB 686, 690 (emphasis in original).[11]

The principle is illustrated by the record of this case. The agreement governing the engineers unit, to which the production unit employees moved, limits seniority to the length of service in the job classification within the engineers unit (R. 108, 75, 76-77, 79-80, 87). The employee's length of service in other units is not considered. The result is that, upon a reduction in force in the engineers unit, length of service within that unit exclusively controls the determination of which employees are to be laid-off and which retained in service (*ibid.*). The Company and the union representing the engineers unit are, and should be, entirely free to adopt this system of seniority in the engineers unit.

By the same token, however, the Company and the IAM should be entirely free, in determining movement from the engineers unit to the production unit, to consider that the engineers unit does not recognize

[11] See also, *Local 115, Central States Petroleum Union*, 127 NLRB No. 31, 46 LRRM 1001; *Speidel Corp.*, 120 NLRB 733, 734-736; *Kansas City Star Co.*, 119 NLRB 972, 997; *Namm's Inc.*, 102 NLRB 466, 469-471.

service within the production unit. The Company and the IAM are entitled to conclude that, since the engineers unit chooses to operate as a self-contained entity, employees who move into that unit commit themselves exclusively to it and sever their connection with the production unit. Had the engineers unit recognized production unit service, there would be significantly less "bumping back" into the production unit upon a reduction in force in the engineers unit, and hence significantly less dislocation among the employees within the production unit, as this record shows (R. 73-74, 75-76, 86). Since the engineers unit chooses to extend job security within its unit solely upon the basis of service within that unit, it is surely within the prerogative of the production unit to safeguard the job security of the employees then working within its own unit in preference to employees who would return from a unit that refuses to recognize production unit service. This indeed would seem to be the natural consequence of the insularity of the engineers unit.

The Company and the IAM may consistently entertain a different attitude towards the return to the production unit of unrepresented employees. First of all, for ought that the record shows, the Company does indeed take into account prior service in the production unit in determining which of the unrepresented employees to lay off. This alone would differentiate their situation from that of the represented employees. Even if prior production unit service of unrepresented employees is not considered, the company may have granted a benefit to the production unit in exchange for freer movement into that unit of unrepresented employees.

In short, the question of unit reciprocity or its lack is not to be confused with discrimination based on union membership or activity or the want of either. Unions in their capacity as representatives act to protect the interests of the employees within the units they represent. There may be an inter-unit conflict of interests. The representative champions the interests of the unit it represents. But it is the unit member, not the union member, who is represented; it is the unit interest, not the union interest, which is championed; and it is a unit differentiation which may result. It follows that a unit differentiation is not discrimination based on union membership or activity or the want of either.

Notwithstanding the demonstrable referability of the agreement to evaluation of a question of unit reciprocity, one of the "countless variables" within the "wide range of reasonableness . . . allowed a statutory bargaining representative in serving the unit it represents" (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338), the Board condemns the agreement *simpliciter* as discrimination in employment discouraging union membership. In affirming the Board, the court below invokes and misapplies this Court's decision in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17 (*infra*, p. 8a). Relying on what it deems to be the rationale of *Radio Officers*, the court below first states that "the contract *tends* to discourage membership in unions other than IAM by those employees who transfer from the production unit"; it then states that *intent* to discourage membership may reasonably be inferred from this *tendency;* and it concludes that the agreement is hence invalid (*infra*, pp. 7a-8a, emphasis supplied). While this Court's decision in *Radio*

Officers is not free of ambiguity, its application by the court below makes a shambles of it.

(a) The Board made no finding that the intent of either the Company or the IAM was to discourage membership. In the absence of a finding of intent, the only basis for considering a finding to be superfluous is that stated by Judge Learned Hand concurring in *National Labor Relations Board* v. *Business Machine Board*, 228 F. 2d 553, 561 (C.A. 2), cert. denied, 351 U.S. 962:

> . . . . the [Supreme] Court in that case [*Radio Officers*] did not say that the employer's motive was not crucial in deciding whether he had "discouraged" joining the union; but it did say that a special finding as to his motive was not essential. So it seems to me that the upshot of the decision is that, if the evidence is strong enough, the court may conclude that, although the Board did not so find, no other finding was possible, and the case may be disposed of as though the finding had been made. I cannot otherwise account for the fact that motive was held to be critical, and yet that a finding of motive was unnecessary. Translated to the present occasion, it seems to me that we must dispose of this appeal by deciding whether the evidence was so imperative that the Board would have been obliged to find that the motive existed. That amounts to saying that we should assume that the motive did not exist unless we should have reversed any finding except that it did.

The court below did not state that "no other finding was possible." It held only that intent "may reasonably be inferred" (*infra*, p. 8a). But there is a world of difference between dispensing with a finding of intent because no other is possible and dispensing with it

because it is a permissible but not an inevitable inference.

(b) This Court in *Radio Officers* held that it "is clear" that "Congress intended the employer's purpose in discriminating to be controlling. . . ." 347 U.S. at 44. It also held that "specific evidence of intent . . . is not an indispensable element of proof," observing that "a man is held to intend the foreseeable consequences of his conduct." 347 U.S. at 44-45. The requirement of intent, plus the dispensability of specific proof of it, seems to add up to the rule that intent is inferable from the character and consequence of the conduct.

On this reading the least that is required of the Board is a finding of intent based on an inference from the conduct. But the Board made no finding of intent. It could not. For there is no basis for an inference. There is not a single solitary circumstance in this case other than inclusion in the agreement of the provisions pertaining to out-of-unit seniority and their application in accordance with their terms. Any inference must therefore be drawn exclusively from the face of the provisions. And it is not possible to infer from their face that either the Company or the IAM were activated by a purpose to discourage membership in or bargaining through unions other than the IAM in units not represented by the IAM.

(c) All that the Board found is that "the *net effect* of the application and enforcement of the seniority provisions of the contract was to penalize the employees for exercising their statutory right to be represented by a union of their own choosing and to discourage membership in such union within the meaning of Section 8(a)(3) of the Act" (R. 30, emphasis supplied). As-

suming there was such a "net effect,"[12] the minimum that *Radio Officers* teaches is that effect is not the criterion. "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a)(3) and its predecessor" (347 U.S. at 43); "Congress intended the employer's purpose in discriminating to be controlling . . ." (*id.* at 44).

The decision below rests upon a misconception of *Radio Officers*. The same misconception of *Radio Officers* underlies the Board's hiring hall position, *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 895-896, remanded, 270 F. 2d 425 (C.A. 9). Correction of the misreading of *Radio Officers* is indispensable in order to restore Sections 8(a)(3) and 8(b)(2) to their proper function of prohibiting discrimination based on union membership or activity or the want of either, and to end their use as a vehicle for interference with contractual arrangements not so founded. In this facet of the case the interference was manifested by attenuating the perquisites of unit membership into discrimination because of union membership. This in itself is important, because differentiation in employment terms on the basis of unit is common in collective bargaining. The Board's attitude in this area is ambivalent. It sometimes forthrightly recognizes that "no inherent unlawful intent" can be deduced from differentiation based on representation in separate units; "an inference of such motivation cannot be drawn from the disparity of treatment alone; it must necessarily be predicated on other independent evidence." *Anheuser-Busch, Inc.*,

[12] If certiorari is granted, we will show that there is no such effect.

112 NLRB 686, 690.[13] At other times the Board quite inconsistently holds that such "disparate treatment . . . had the inherent effect of discouraging union membership and therefore constituted a violation of Section 8(a)(3) and (1) of the Act, even absent independent evidence of the . . . [employer's] antiunion motivation." *Intermountain Equipment Co.*, 114 NLRB 1371, 1373, set aside, 239 F. 2d 480 (C.A. 9).[14] The Court should resolve this important and recurring question.

3. Final manifestation of the Board's interference in the formation of the substantive terms of the bargain is found in the order of the Board enforced by the court below.

(a) The order requires that the IAM (R. 31-32):

> Notify Menasco Manufacturing Company, James S. Gibbs, Triness F. Light and James A. Madison, in writing, that it consents to the restoration of the said employees' seniority determined on the basis of the employees' latest date of hire with the Company prior to their lay off, and that it has no objection to the exercise by said employees of their seniority rights, including the right to "bump" employees of lesser seniority in the unit of employees represented by the Respondents.

There is no valid foundation for the requirement that the IAM consent to the restoration of the seniority of the three laid-off employees. Withholding seniority from these employees is, on the Board's premise, wrongful solely because the agreement grants seniority to employees who move to unrepresented units but not to employees who move to represented units. It is the

[13] See also cases cited *supra*, p. 22, n. 11.

[14] See also, *Whiland Co.*, 120 NLRB 814, 818-819, set aside, 271 F. 2d 122 (C.A. 6).

differentiation in the seniority status of employees who move to represented and unrepresented units which is regarded as the act of "discrimination." It is admitted that the agreement could validly provide either (1) "that employees transferring from the IAM unit would be deprived of seniority acquired in the IAM unit," or (2) "that seniority previously acquired would accrue to all employees transferring from the IAM unit who later returned to said unit" (R. 16). Accordingly, "discrimination" would cease were seniority either withheld from all employees who move from the production unit or granted to all such employees.

But the order precludes the choice which the Board acknowledges exists. It requires the restoration of seniority to the three laid-off employees. It thus divests the IAM of the choice of rectifying the "discrimination" by withdrawing seniority from the employees who moved to unrepresented units. Yet this is an option that the Board itself recognizes that the IAM can validly exercise. The order cannot strip the IAM of an option which is rightfully its.

The situation comes down to this: On the Board's own premise the Company and the IAM are legally free to confer upon or withhold seniority from employees who move from the production unit, or to condition the grant of seniority upon such employees, *subject only to the requirement that seniority status shall not be differentiated upon the basis of movement into represented or unrepresented units.* Accordingly, the order cannot go beyond requiring that the IAM consent to restore seniority to the three laid-off employees *if, but only if*, the IAM and the Company continue to agree to grant seniority to employees who move to unrepresented units. To give the Company and the IAM a reasonable opportunity to exercise the option

which is theirs, the order must extend to the IAM a minimum period of sixty days within which to negotiate an out-of-unit seniority clause with the Company which conforms with the requirement that the seniority of employees who move to represented or unrepresented units shall not be differentiated on that basis. Only if the IAM and the Company at the end of that period agree to grant seniority to employees who move to unrepresented units can the order validly require the IAM to consent to the restoration of seniority to the three laid-off employees.

In addition, since the option does exist to redress the "discrimination" by withdrawing seniority from the employees who move to unrepresented units rather than by granting it to those who move to represented units, the order is invalid in its further requirement that the IAM state "that it has no objection to the exercise by the said employees of their seniority rights, including the right to 'bump' employees of lesser seniority in the unit of employees represented by Respondents". (R. 32). The IAM may properly entertain such an objection if seniority is withdrawn from employees who move to unrepresented units. This part of the order incorrectly presumes that no option exists or that it will be exercised in favor of granting seniority to employees who move from the production unit.

(b) Nor is there a valid foundation for the requirement of the Board's order that the three laid-off employees be made whole for any loss of pay they sustained because they were not permitted to "bump into" the production unit (R. 32). No back pay is due the three laid-off employees because the IAM took nothing from them which belonged to them. An employee who moves from a unit has no right to return to it except as a contract grants it. The right of the three

employees upon their layoff from the engineers unit to displace employees then working within the production unit depended exclusively upon the contract's conferment upon them of that right based on their having greater contractual seniority within the production unit than the employees they were to displace. In this case the contract did not grant but withheld that right. Whether the out-of-unit seniority provisions of the contract are valid or invalid, they still remain the sole source from which the laid-off employees can draw a right to return to the production unit and displace employees then working within that unit. To invalidate the provisions is not to create a right which the contract withheld.[15]

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1960.

[15] If certiorari is granted additional objections to the back pay order will be expressed, namely, (1) to the finding that the IAM caused the Company to discriminate, and (2) to the finding that Light, one of the three laid-off employees, at the time of his layoff from the engineers unit and his attempt to return to the production unit, was senior to an employee then working in the classification in the production unit from which Light had moved two years before.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,564

June 4, 1960

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727 AND LOCAL LODGE 758, AFL-CIO, *Respondents.*

On Petition for Enforcement of an Order of the National Labor Relations Board

Before: CHAMBERS and STEPHENS, Circuit Judges, and MATHES, District Judge:

MATHES, District Judge:

The National Labor Relations Board invokes the jurisdiction of this Court under § 10(e) of the National Labor Relations Act [29 U.S.C. § 160(e)] to enforce an order of the Board directing respondents to cease and desist from certain alleged unfair labor practices. [See 29 U.S.C. § 151 *et seq.*, as amended by 61 Stat. 136 (1947).]

Stated briefly, the facts are these. Menasco Manufacturing Company, a California corporation, is engaged in the manufacture of airplane parts and, moreover, is engaged in commerce within the meaning of § 2(6) of the Act. [29 U.S.C. § 152(6).] The company is divided into several units. Each unit may be represented from time to time by a different union as bargaining agent, while some units may have no such representative at all. The units concerned in this case are the "production" unit, whose bargaining representative is the respondent union, the International Association of Machinists, Aeronautical Industrial District

Lodge 727 and Local Lodge 758, AFL-CIO (hereinafter "IAM"), and the "engineering" unit whose bargaining representative is Local 183, American Federation of Technical Engineers, AFL-CIO (hereinafter "AFTE"). Both the IAM and the AFTE are labor organizations within the meaning of § 2(5) of the Act. [29 U.S.C. § 152(5).]

Menasco and the IAM entered into a collective bargaining agreement, effective as of July 2, 1956, for a two-year period. Insofar as pertinent here, the agreement provided that employees of the production unit who transferred to unrepresented units within the company would retain seniority in the production unit as of the date of hire; while employees of the production unit who transferred to union-represented units would have seniority only from the date of their return to the production unit. The agreement further provided, however, that IAM and the company could, by "mutual agreement", restore seniority as of the date of hire to any employee returning to the production unit from an unrepresented unit, and that such returning transferees could "bump" employees within the production unit with less than the restored-by-mutual-agreement seniority.

The collective bargaining agreement presently in effect between Menasco and IAM contains provisions substantially identical to those just summarized from the 1956 contract.

Three Menasco employees, James S. Gibbs, James A. Madison and Trinese F. Light, were employed in the production unit and were members of the respondent union when, during 1955 and 1956, the Company extended "bids" to its employees for jobs in the engineering unit. These three men applied for such jobs, and were accepted and transferred from the production to the engineering unit. Following this transfer, all three became members of AFTE, the engineering unit's bargaining representative. Both Gibbs and Madison had begun working for Menasco in the

production unit in 1948, while Light had begun his employment in 1952.

On March 11, 1958, Menasco gave all three a written notice of layoff. The notice stated that the layoff was "[due] to a reduction in force . . . ." On March 14, 1958, the three men were laid off from their jobs in the engineering unit. The evidence in the record shows, and the Board found, that at the time of layoff both Gibbs and Madison had greater company-wide seniority than other employees presently holding jobs in Gibb's and Madison's former job classifications in the production unit. Although the record does not disclose whether Light had such seniority in his former job classification, the Board so found, and the fact was conceded upon oral argument.

Within a few days of the effective date of the layoff, Gibbs and Madison met on separate occasions with representatives of Menasco, IAM and AFTE, and requested that the three laid-off employees be allowed to "bump back" into the production unit represented by IAM, *i.e.*, each would replace the man with the least seniority in the particular production-unit job classification to which he would be returning. At these meetings the representative of Menasco took the position that the employer was willing to see the three employees restored to their former seniority and to their former jobs in the production unit, but could do nothing without a request from IAM that they be so restored. The representative of the respondent union took the position that IAM would not be willing to restore seniority to the three employees by "mutual agreement", as provided in the collective bargaining agreement.

Upon application by the three employees to the Board, a complaint against respondents was filed and a notice of hearing thereon was issued. Thereafter a hearing as provided by § 10(b) of the Act [29 U.S.C. § 160(b)] was held before a Trial Examiner, whose intermediate report and recommended order charged respondents with a violation

of § 8(b)(1)(A) of the Act [29 U.S.C. § 158(b)(1)(A)] by reason of maintaining a discriminatory contract with Menasco, as well as a violation of § 8(b)(2) of the Act [29 U.S.C. § 158(b)(2)] in causing the employer to discriminate against Gibbs, Madison and Light by denying them employment in violation of § 8(a)(3) of the Act [29 U.S.C. § 158(a)(3)].

A three-man board of review, delegated by the Board as provided in § 3(b) of the Act [29 U.S.C. § 153(b)], agreed with both findings of violation as made by the Trial Examiner. Thereupon the Board issued its order, which *inter alia* provides that respondents cease and desist from:

> "(a) Performing, maintaining or otherwise giving effect to the provisions of any agreement with [Menasco], or any other employer, which unlawfully discriminates with respect to the acquisition, retention or restoration of seniority rights of employees of the said Company or any other employer, or which delegates to the Respondents the right to determine the seniority status of any employee;
>
> "(c) In any other manner, restraining or coercing employees of [Menasco] in the exercise of the rights guaranteed in Section 7 of the Act . . . ."

The Board also ordered IAM to consent to restoration of the seniority of Gibbs, Madison and Light, and to make the three employees whole in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 N.L.R.B. 289, 291-294 (1950).

The essential question before us, upon the Board's petition to enforce this order, is whether the seniority provisions of the IAM-Menasco agreement justify the Board's conclusion that respondents are maintaining a discriminatory contract with the company and, in turn, whether the union practices under the contract in the treatment of Gibbs, Madison and Light violate the Act.

The Board's contention in support of the petition is that the agreement is in violation of the Act because it discriminates against employees by discouraging union membership. Specifically, the Board argues that, by allowing those who transfer to unrepresented units to retain their former seniority with the production unit while refusing the same privilege to those who transfer to represented units within the company, IAM is causing Menasco to discriminate against employees by discouraging both groups of transferees from seeking union representation within their new units as is their right. [See 29 U.S.C. § 157]. In other words, as the Board views it, the prospective loss or retention of seniority and the correlative privilege of "bumping back" upon layoff from a new unit is a substantial factor in motivating transferees to unrepresented units to maintain the status quo, and in motivating transferees to represented units to seek a change to unrepresented status.

Challenging the validity of the Board's order, respondents contend that the contractual provisions in question neither encourage nor discourage membership in IAM, inasmuch as they apply to all production unit employees, regardless of whether or not they are IAM members. Respondents urge further that loss of seniority is the price an employee should expect to pay for a transfer to what is usually a better job, and that such a loss is, moreover, but a necessary consequence of respondents' duty to protect all employees of the production unit. The Board's reply to respondents' contention is in essence that reinstatement of transferees to their previous seniority by "mutual agreement" of the respondents and the employer in effect gives IAM a "veto power" over such reinstatement, and so may encourage retention of membership in IAM and discourage transferees from seeking or retaining a new union representative.

It is well settled of course, as respondents point out, that seniority rights are neither inherent nor constitutional, but rather are created either by statute or by contract. [*Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-339 (1953); *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 526-527 (1949); *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 52-54 (1947); see: *NLRB* v. *Wheland Co.*, 271 F.2d 122, 124-125 (6th Cir. 1959); *Colbert* v. *Brotherhood of R.R. Trainmen*, 206 F.2d 9, 13 (9th Cir. 1953).]

In formulating provisions as to seniority in collective bargaining agreements, it is inevitable of course that "differences [will] arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected." [*Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. at 338.]

But while the latitude necessary to allow a union and an employer to negotiate an agreement must as a practical matter be broad enough to permit them to draw distinctions between different classes of employees [see: *Intermountain Equipment Co.* v. *NLRB*, 239 F.2d 480, 483 (9th Cir. 1956); *NLRB* v. *Nash-Finch Co.*, 211 F.2d 622, 625-626 (8th Cir. 1954); *Speidel Corp.*, 120 N.L.R.B. 733, 734-739 (1958); *Anheuser-Busch, Inc.*, 112 N.L.R.B. 686, 687-690 (1955); *Dougherty Co.*, 112 N.L.R.B. 986, 988-989 (1955)], still this latitude is plainly limited by the public policy, expressed in the Act itself, which forbids either union or employer to discriminate against an employee so as to encourage or discourage his membership in a union. [29 U.S.C. § 158.] It is clear as well that this policy would forbid seniority status being used as a basis for perpetuating any discrimination against employees in violation of the Act. [*NLRB* v. *Local 886, Teamsters Union*, 235 F.2d 105, 106-107 (10th Cir. 1956); *NLRB* v. *Dallas General Drivers*, 228 F.2d 702,

705-706 (5th Cir. 1956); *NLRB* v. *Local 41, Teamsters Union*, 225 F.2d 343, 346-348 (8th Cir. 1955), *enforcing order in Pacific Intermountain Express Co.*, 107 N.L.R.B. 837, 839-840, 844-846 (1954); *accord, Local 553, Teamsters Union* v. *NLRB*, 266 F.2d 552, 553-554 (2d Cir. 1959) (dictum).]

Just as it would be a violation of the Act for an employer to require union approval as a prerequisite to employment [see: *NLRB* v. *E. F. Shuck Construction Co.*, 243 F.2d 519, 521, 523 (9th Cir. 1957); *NLRB* v. *Alaska S. S. Co.*, 211 F.2d 357, 359-360 (9th Cir. 1954); *NLRB* v. *Int'l Longshoremen's Union*, 210 F.2d 581, 583-584 (9th Cir. 1954); *Los Angeles-Seattle Motor Express, Inc.*, 121 N.L.R.B. 1629, 1630-1631 (1958)], so also would the complete delegation to a union by an employer of the task of determining seniority rights be a violation of the Act, unless the criteria established by agreement for union determination of seniority are non-discriminatory, and the Union's duties with respect to such determination are merely ministerial. [*Local 553, Teamsters Union* v. *NLRB*, *supra*, 266 F.2d at 553-554; see: *NLRB* v. *Carpenters Local 176*, ... F.2d ..., 28 U.S.L.WEEK 2530 (1st Cir. March 30, 1960); *NLRB* v. *Local 886, Teamsters Union*, *supra*, 235 F.2d at 106-107; *NLRB* v. *Dallas General Drivers*, *supra*, 228 F.2d at 705-706; *NLRB* v. *Local 41, Teamsters Union*, *supra*, 225 F.2d at 346-348; *Kramer Bros. Freight Lines, Inc.*, 121 N.L.R.B. 1461, 1463, (1958).]

The plain, if not indeed almost irresistible, inference to be drawn with reason from the questioned provisions of the IAM-Menasco agreement is that the contract tends to discourage membership in unions other than IAM by those employees who transfer from the production unit. Respondents urge, however, that there is no intent on their part to discourage union membership and that, aside from the inference drawn, there is no evidence to establish either intent or motive on the part of IAM to discourage membership in other unions.

While motive is often a helpful factor in the determination of state of mind or intent, and especially so where the issue is whether one is guilty of an unfair labor practice, it is permissible to find motive as a result of inference "where the encouragement or discouragement can be reasonably inferred from the nature of the discrimination." [*Radio Officers Union* v. *NLRB*, 347 U.S. 17, 51, 55-56 (1954); see *NLRB* v. *Business Machine Board*, 228 F.2d 553, 561 (2d Cir. 1955) (concurring opinion); see also *NLRB* v. *Insurance Agents Union*, 361 U.S. 477, 503-506 (1960) (concurring opinion); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477-491 (1951).] If then it may reasonably be inferred from the alleged discriminatory practice in the proceeding at bar that the reasonably-to-be-expected result thereof would be either encouragement or discouragement of union membership, motive and intent may likewise be inferred. "This recognition that specific proof of intent is unnecessary where . . . conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct . . . [and] protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement." [*Radio Officers Union* v. *NLRB*, *supra*, 347 U.S. at 45.]

Here logic compels the conclusion that, as a "natural consequence" of the contractual provisions in question, employees in the production unit would be discouraged from seeking new union representation upon transfer to other units, if the price of such representation were loss of seniority and "bumping-back" privileges within the production unit. Moreover, respondents' attempt to justify the contract on the theory that the first duty of IAM is to protect the interests of the employees within the bargaining unit must fall for want of merit, since the contract clearly provides that some employees, while employed outside the production unit, may retain their seniority within

the unit, if only they are working in a unit not represented by a union.

It follows that the Board's finding that IAM is maintaining a contract in violation of § 8(b)(1)(A) of the Act [29 U.S.C. § 158(b)(1)(A)] must be upheld; and this result in turn leads to the holding that respondents violated § 8(b)(2) of the Act [29 U.S.C. § 158(b)(2)] by causing Menasco to deny employment to Gibbs, Madison and Light in derogation of § 8(a)(3) of the Act [29 U.S.C. § 158(a)(3)].

Respondents next advance the contention that, even if guilty of a violation, IAM should not be forced to restore the employees as ordered by the Board, but should be given the option to negotiate with Menasco to strip all seniority rights from all production-unit employees who transfer to other units within the company, upon the condition that if these negotiations fail within sixty days to produce a seniority provision that is not in violation of the Act, then and only then would restoration be required. If, on the other hand, a new provision is agreed upon that is nondiscriminatory, IAM should not be required to restore the employees since, goes the argument, doing away with discriminatory practices should not operate to create or vest rights.

But violation of rights protected by the Act as to the three employees here is now *fait accompli*, and unquestionably it is within the Board's power to order restoration. [29 U.S.C. § 160(c); *see Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189-200 (1941).] It is beyond dispute, moreover, that the Act lays upon respondents the plain duty to refrain from discriminatory acts, and future conduct that is lawful cannot purchase relief from liability for past conduct that was not lawful.

Finally, respondents attack the Board's order upon the ground that, in light of our opinion in *Morrison-Knudsen, Inc. v. NLRB*, 270 F.2d 864, 865-866 (9th Cir. 1959), the

order is too broad in scope because its prohibitions include coercion "in any other manner", and maintaining similar contracts with "any other employer." In keeping with our holding in the *Morrison-Knudsen* case, the order must be modified to exclude that part which prohibits coercion "in any other manner", since there is no evidence in the record before us of any other form of coercion by respondents.

Furthermore, since there is no evidence in the record that other similar contracts are now in force with any other employer, the phrase "or any other employer" must also be stricken from the order. [*Communications Workers* v. *NLRB*, ... U.S. ..., 28 U.S.L.WEEK 4291 (U.S. May 3, 1960); see: *May Department Stores* v. *NLRB*, 326 U.S. 376, 389-392 (1945); *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435-437 (1941).]

The order of the Board will be modified by striking from the quoted provisions thereof the phrase "or any other employer" and the phrase "In any other manner", and the order as so modified will be enforced.

(Endorsed) Opinion Filed June 4, 1960.

Frank H. Schmid, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16564

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727 and LOCAL LODGE 758, AFL-CIO, *Respondents*.

Decree Enforcing, as Modified, an Order of the National Labor Relations Board

Before: CHAMBERS and STEPHENS, Circuit Judges and MATHES, District Judge:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it on April 6, 1959, and directed against International Association of Machinists, Aeronautical Industrial District Lodge 727 and Local Lodge 758, AFL-CIO, their officers, representatives, agents, successors and assigns. The Court heard argument of respective counsel on April 8, 1960, and has considered the briefs and transcript of record filed in this cause. On June 4, 1960, the Court, being fully advised in the premises, handed down its decision enforcing, as modified, the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the Respondents International Association of Machinists, Aeronautical Industrial District Lodge 727 and Local Lodge 758, AFL-CIO, their officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Performing, maintaining or otherwise giving effect to the provisions of any agreement with Mercury Manufac-

turing Company, which unlawfully discriminates with respect to the acquisition, retention or restoration of seniority rights of employees of the said Company, or which delegates to the Respondents the right to determine the seniority status of any employee;

(b) Causing or attempting to cause Menasco Manufacturing Company, to discriminate against employees in violation of Section 8(a)(3) of the National Labor Relations Act (hereinafter called the Act);

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Notify Menasco Manufacturing Company, James S. Gibbs, Triness F. Light and James A. Madison, in writing, that it consents to the restoration of the said employees' seniority determined on the basis of the employees' latest date of hire with the Company prior to their lay off, and that it has no objection to the exercise by the said employees of their seniority rights, including the right to bump employees of lesser seniority in the unit of employees represented by the Respondents.

(b) Make whole James S. Gibbs, Triness F. Light and James A. Madison for any loss of pay suffered by reason of Respondents' action in causing the Company to discriminate against said employees, in the manner set forth in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated November 19, 1958, entitled The Remedy;

(c) Post at their offices, hiring halls and meeting halls copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region (Los Angeles, California), shall, after being duly signed by the Respondents' representatives, be posted by them on receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places including all places where notices to

members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(d) Mail to the aforesaid Regional Director for the Twenty-first Region signed copies of the notice attached hereto and marked Appendix for posting by Menasco Manufacturing Company at its place of business in Burbank, California, in places where notices to employees are customarily posted, if the Company is willing to do so. Copies of said notice to be furnished by the Regional Director, shall, after being duly signed by representatives of the Respondents, be forthwith returned to the Regional Director for such posting;

(e) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree as to what steps they have taken to comply therewith.

Endorsed. Decree Filed and Entered July 18, 1950.

s/ FRANK H. SCHMID
Frank H. Schmid
Clerk

A TRUE COPY,

ATTEST:

FRANK H. SCHMID
Clerk

FILE COPY

FILED
OCT 5 1960
JAMES R. BROWNING, Clerk

No. 394

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL ASSOCIATION OF MACHINISTS, AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727 and LOCAL LODGE 758, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 279 F. 2d 761 (see Pet. 1a-10a). The decision and order of the National Labor Relations Board (R. 10-35) are reported at 123 NLRB 627.

JURISDICTION

The opinion of the court below was issued on June 4, 1960, a petition for rehearing was denied on July

7, 1960, and the decree was entered on July 18, 1960 (Pet. 1a, 13a, 2). The petition for a writ of certiorari was filed on September 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The collective agreement between the Company and the Union provided in part that employees who were promoted out of the production unit and later sought to transfer back to it would retain seniority rights in that unit if they were not represented by another labor organization in the unit to which they had been promoted, but that they would not retain such rights if they were so represented. The agreement further provided that seniority rights so lost could be restored by mutual agreement of the Company and the Union. Three employees were promoted out of the production unit to the engineers unit; when a layoff affected the latter unit, the Company sought to transfer them back to the production unit. Because the three had been represented by another union while in the engineers unit, they lost their seniority in the production unit, and were therefore discharged. The questions presented are:

1. Whether the Board properly held that a contract which conditioned seniority rights on whether employees had or had not exercised their statutory right to select a bargaining representative unlawfully restrained or coerced employees in the exercise of that right.

2. Whether the Board properly ordered the Union to restore to the three employees the wages and status they lost because the Union applied the unlawful contractual provision to cause their discharge.

3. Whether the Board properly ordered the Union to stop giving effect to any agreement with the Company which conditioned seniority on union representation or which delegated to the Union the right to determine seniority.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth at Pet. 3 are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. * * * (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *.

STATEMENT

A. The Board's Findings of Fact

The Burbank, California, plant of Menasco Manufacturing Company, contains a number of separate departments (R. 13). Employees in some of these departments are represented by a labor union for purposes of collective bargaining, but the employees in some other departments do not bargain collectively (R. 13; 43-44, 81). The petitioners represent the various machinists and inspectors; the American Federation of Technical Engineers (AFTE) represents process engineers, the next higher grade classification (R. 13-14; 46-47, 76).

Prior to May 1956, petitioners had a contract with the Company which provided that if an employee in the machinists' unit was advanced to a higher job (i.e., to process engineer) and was thereafter laid off for lack of work, he could return to the machinists' unit without loss of seniority, and employee James A. Madison in fact did so return in March 1956 (R. 57, 69). At that time, the engineers were not represented by any labor organization (R. 50). However in May 1956, as the result of a Board election, the AFTE was certified as the collective bargaining agent for a unit composed of process and other engineers. (R. 59).

On July 2, 1956, petitioners and the Company signed a two-year contract covering the unit of machinists, which provided *inter alia* (R. 12; 89-96; emphasis supplied):

ARTICLE IV

SENIORITY

Sec. 1. Basis for Seniority

4.16 * * * An employee who has acquired at least one (1) year seniority in the bargaining unit and who moves to an occupation in the Company *not represented by another collective bargaining agent*, and who later moves back into an occupation represented by the Union *shall have seniority from the latest date of hire with the Company.*.

An employee who moves into an occupation *represented by another collective bargaining agent*, and who later moves back into an occupation represented by the Union, *shall have seniority from the date of the move back into the bargaining unit.*

The Company and the Union may by mutual agreement restore seniority to any employee who moves back into the bargaining unit under any of the three categories mentioned above.

4.32 Bumps—* * *. An individual in the employ of the Company who had established seniority in excess of one (1) year at the time of movement to a position outside the bargaining unit shall at time of layoff or release (but not discharge) be given the opportunity to bump into the bargaining unit (last previously held classification in reverse order) provided he possesses greater seniority than the employee bumped and meets the seniority requirements as set forth in Paragraph 4.16 * * *.

Employee Madison was aware of this provision and it gave him concern when he was again advanced from the machinists' unit to process engineer in August 1956 (R. 58, 67-68). Similarly, employees Gibbs and Light were transferred from occupations in the unit which petitioners represented to jobs as process engineers in the unit represented by the Engineers (R. 28; 46-47, 51, 58, 65-66). Each of them at the time of his transfer had acquired more than one year's seniority in the unit which petitioners represented (*ibid.*). On March 14, 1958, these employees had greater seniority than other employees then occupying jobs in the unit represented by petitioners (R. 28-29; 50, 65, 66, 82, 88-89).

On that date, Gibbs, Light and Madison were in a group of process engineers the Company had decided to lay off for lack of work (R. 28; 65, 82). On several occasions before the effective date of their layoff, Gibbs and Madison, accompanied by James High, business representative of the Engineers, met with officials of the Company and petitioners and requested that the three employees be permitted to "bump back" into the unit represented by petitioners (R. 28-29; 42-50, 60-65, 71-72, 83, 87-89).

At these conferences, the Company's representatives stated that it would be "very happy" to restore seniority to the three employees in question, thus enabling them to bump into the IAM unit and thereby remain in the Company's employ, but that under the contract it could not do so without a request from the IAM (R. 29; 55-56, 61-63, 88-89). Petitioners

refused to permit the restoration of seniority which the employees had lost when the engineers unit acquired a bargaining representative (R. 29; 50, 55-56, 58, 89). As a result, the three employees were laid off on March 14 (R. 29; 54, 60, 65-66).

B. The Board's Conclusions and Order

On the foregoing facts the Board concluded that the three employees were deprived of their seniority, and hence of the right to return to their former jobs, solely because they were in a unit which had a collective bargaining representative; and, therefore, that the net effect of the application and enforcement of the seniority clauses of the contract was to penalize the employees for exercising their right to be represented by a union, and thus to discourage union membership within the meaning of Section 8(a)(3) of the Act. Accordingly, the Board concluded that petitioners violated Section 8(b)(1)(A) and (2) of the Act. (R. 30.)

The Board's order requires petitioners to cease and desist from maintaining or giving effect to any provision of a contract which unlawfully discriminates as to seniority or gives petitioners the right to determine seniority (R. 30). Affirmatively, the order requires petitioners to notify the Company that petitioners consent to the restoration of the seniority of the three employees and to their "bumping" employees of lesser seniority in petitioners' unit (R. 31-32). The order also directs petitioners to make whole the three employees for loss of pay, and to post the usual appropriate notices (R. 32-35).

C. The Decision of the Court Below

The court below, except for minor modifications of the order not material here, sustained the position of the Board (Pet. 1a-10a). The court observed (Pet. 7a) that "The plain, if not indeed almost irresistible, inference to be drawn with reason from the questioned provisions of the IAM-Menasco agreement is that the contract tends to discourage membership in unions other than IAM by those employees who transfer from the production unit." The court further stated (Pet. 8a), "* * * logic compels the conclusion that, as a 'natural consequence' of the contractual provisions in question, employees in the production unit would be discouraged from seeking new union representation upon transfer to other units, if the price of such representation were loss of seniority and 'bumping-back' privileges within the production unit."

ARGUMENT

1. The decisive fact in this case is that three employees lost employment because they exercised their statutory right to be represented by a labor organization. The Company was prepared to employ the three in the production unit when the petitioners objected, pointing out that under the contract the men had lost their seniority solely because, while in another unit, they had been represented by a union. A plainer case of discriminatory treatment based on the exercise or non-exercise of statutory rights would be difficult to devise. Petitioners' suggestion, taken from "refusal to bargain" cases, that the Board is

here improperly concerned with the substantive terms of collective bargaining agreements (Pet. 10-11) is wide of the mark; where a contract provides on its face for discriminatory treatment violative of the Act, the Board's authority to declare the contract invalid has never been doubted. And petitioners' attempt to justify the discrimination in this case as "unit" rather than "union" discrimination (Pet. 19-24) is likewise beside the point. Of course, employees in different units may be treated differently, but under the statute such differentiation may not, as it did here, turn on whether the employees in a particular unit exercise their statutory right to choose a bargaining representative.

2. The Board's order restoring seniority and back pay to the three employees returns them to the status and compensation their employer would have given them but for the Union's unlawful insistence on applying a discriminatory contract. Where a status, whether that of employee or seniority among employees, is lost because of the exercise of a statutory right, the Board in vindication of the statutory right may properly order the status restored. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 187-189. Petitioners may, as they contend (Pet. 29-30), execute a new agreement which will withhold seniority from all transferees, but such an agreement would operate *in futuro*, whereas, as the court below observed (Pet. 9a), "violation of rights protected by the Act as to the three employees here is now *fait accompli* * * * future conduct that is lawful cannot purchase relief from liability for past conduct that was not lawful."

3. In remedying the unfair labor practice, the Board, *inter alia*, directed petitioners not to enter into a contract which delegated to them the right to determine seniority status (last clause of paragraph 1(a), R. 31). Petitioners rely upon this minor aspect of the case in an attempt to secure review of the Board's position that the delegation of exclusive control over seniority to the union violates the Act, urging that the issue is analogous to that before this Court in the "hiring hall' cases (Pet. 11-19). But petitioners are bound to concede, as they do (Pet. 15-16), that the Board's position on union control over seniority has met with uniform judicial approval,[1] and in none of the petitions for certiorari or oppositions thereto in the "hiring hall" cases was any claim advanced that the decisions adverse to the Board on hiring halls were in any way in conflict with the holdings of the courts on seniority clauses. The Board's own leading decision on hiring halls (*Mountain Pacific Chapter*, 119 NLRB 883, 893-900) contains no reference to the seniority cases and proceeds on a different theory from that enunciated in those cases.

Nor are petitioners aided by asserting that the provision in their contract for restoration of seniority by "mutual agreement" distinguishes this case from those in which the courts have condemned union control of seniority (Pet. 15). To require the Union's

[1] To the four cases cited by petitioners (Pet. 15-16) should be added *Chief Freight Lines Co.*, 111 NLRB 22, 34, enforced *sub nom. National Labor Relations Board* v. *Oklahoma City General Drivers, Warehousemen and Helpers, Local Union 886*, 235 F. 2d 105, 106 (C.A. 10).

agreement to restoration of a status discriminatorily lost is to vest the Union with power to perpetuate the loss of status. In any event, the provision for restoration of seniority by "mutual agreement" is peculiar to the contract in this case, and thus presents no question of importance in the administration of the Act. Indeed, if, as petitioners suggest, the presence of the "mutual agreement" clause in this contract distinguishes it from the other cases, this militates against this Court's reaching the broader issue which petitioners tender respecting the legality of an unequivocal grant of unilateral control to the Union over seniority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 1960.

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